

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NEW ENGLAND CARPENTERS .CIVIL ACTION NO. 05-11148-PBS
HEALTH BENEFITS FUND, et al.
Plaintiffs .
V. . BOSTON, MASSACHUSETTS
APRIL 17, 2008
FIRST DATABANK, INC., et al.
Defendants .
.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROBERT B. COLLINGS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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P R O C E E D I N G S

(COURT CALLED INTO SESSION)

THE CLERK: The Honorable Robert B. Collings
presiding.

THE COURT: All right. You may be seated.

THE CLERK: In the case of New England Carpenters v.
First Databank, Civil Action No. 05-11148 will now be heard
before this Court. Will counsel please identify themselves for
the record.

MS. CONNOLLY: Good afternoon, Your Honor, Jennifer
Connolly, Wexler Toriseva Wallace on behalf of the plaintiffs.

THE COURT: Okay. Good afternoon.

MR. FLUM: Good afternoon, Your Honor, Paul Flum from
Morrison & Foerster representing McKesson.

THE COURT: Hold on just a second.

PAUSE

THE COURT: Okay. Good afternoon and?

MS. SCHECTER: Lori Schechter also from Morrison &
Foerster for McKesson.

THE COURT: Okay. I'll hear the moving party.

MR. FLUM: Your Honor, this is a motion for a
protective order that McKesson has filed. It's a motion that
he has directed at one request out of four requests, just the
last request in a series of third-party subpoenas that the
plaintiff served in this case on major national retailers,

1 pharmacy retailers and those subpoenas were served at the end
2 of January. The grounds for the order or for our protective
3 order motion, Your Honor, is that this discovery that
4 plaintiffs seek in the fourth request violates a scheduling
5 order that Judge Saris entered in this case on January 2nd,
6 2008, and, specifically, that scheduling order provides that
7 discovery is being reopened for a limited purpose relating to a
8 new series of claims that are being advanced on behalf of a
9 proposed new class of uninsured consumers, and it goes on to
10 order that that discovery is allowed only as to new issues
11 raised by the usual and customary class, that's the class of
12 uninsured consumers in a third amended complaint. So it's a
13 limited grant of discovery and the discovery that's the subject
14 of Request No. 4 in the subpoenas and of this motion goes
15 beyond the scope of what Judge Saris has permitted.

16 Now, the scheduling order that this motion is based
17 on resulted from a motion that the plaintiffs filed last fall
18 to amend their complaint to add this new uninsured class who
19 pay what's called usual and customary or U&C cash prices for
20 prescription drugs. At the point of that motion was made for
21 leave to amend discovery had closed. All discovery on the rest
22 of the case relating to a class of insurance companies and
23 other third party payers as well as a class of consumers who
24 had the insurance had been completed in July of last year. The
25 plaintiffs came forward and said we want to add a new class of

1 uninsured consumers and they said that they wanted to do that
2 because their complaint alleges that the prices, these usual
3 and customary cash prices, uninsured consumers pay, are tied to
4 AWP and AWP is the pricing benchmark that is the subject of the
5 claims that are being brought on behalf of the existing two
6 classes, and this is right out of their complaint, paragraph 81
7 of the third amended complaint where they say U&C payments are
8 tied to the reported AWP and are usually set at a price above
9 AWP. Hence, an artificial increase in the AWP uniformly
10 impacts such class members. That's the allegation, and they
11 represented to Judge Saris when they moved for leave to add
12 that class that at most limited discovery would be required for
13 these new claims, and I'm looking at their motion for leave to
14 amend. It was filed on October 2nd, 2007. It's docket number
15 322 in this case. They made that representation on page 2 and
16 they made it again on page 4 and on page 4 they went on to say
17 only limited discovery will be required and such discovery can
18 be completed rapidly. So based on those representations, based
19 on the allegation that AWP, I'm sorry, that U&C prices are
20 tied to AWP, Judge Saris granted the motion for leave to amend
21 and entered a scheduling order re-opening discovery for a
22 limited purpose. And when we were negotiating that scheduling
23 order, both sides agreed that the discovery going forward on
24 this new U&C claim should be limited and should not be the
25 basis to open up a back door to redo discovery relating to

1 other parts of the case since that discovery had closed back
2 in July and we submitted to Your Honor the correspondence back
3 and forth between the parties sort of discussing the need to
4 put these limits in. In fact, it was the plaintiffs who
5 proposed first that we have a backdoor limitation and we agreed
6 and we stand on that. We think that discovery should be
7 focused on the new claims going forward and that correspondence
8 is Exhibit 1 to the Flum Declaration that was filed in support
9 of this motion.

10 So as I said, after the entry of that scheduling
11 order at the beginning of January, plaintiffs served subpoenas
12 on eight national retail chains, K-Mart, Wal*Mart, you know,
13 retailers of that type, and the subpoenas have four requests in
14 them. They're all identical. We submitted copies with my
15 declaration. The one to K-Mart is attached as Exhibit 5, and
16 if Your Honor turns to the request which is at the end of the
17 subpoena, you'll see that they're asking for four categories.

18 THE COURT: Hold on just a second.

19 MR. FLUM: Sure.

20 PAUSE

21 THE COURT: I got it.

22 MR. FLUM: All right. So under the documents to be
23 produced, there are four numbered paragraphs, and the first
24 three we have no problem with. The first paragraph is asking
25 for documents concerning your store policies and formula to

1 generate or determine your U&C prices for brand drugs. We
2 have absolutely no problem. That's exactly in the four corners
3 of what Judge Saris ordered. We're pursuing similar discovery
4 ourselves. Request No. 2 is asking for documents concerning
5 the relationship between U&C prices and AWP. And, again, it's
6 within the four corners of what Judge Saris ordered. Request
7 number 3, and we don't object to number 2. Request No. 3 is
8 asking for a lot of specific claims data. There's a long list
9 you see of the particular items they want, but it's all tied to
10 U&C prices, the prices paid by the members of this new class
11 for the group of brand named drugs that are at issue in the
12 case, and it's 1,442 specific drug doses that are involved.
13 It's a lot of information because it's asking for particular
14 transactions over a 10-year-period, but it's tied to the U&C
15 price. And again, we have no problem with that. Request No. 4
16 is the one that is the subject of the motion and that request
17 is again asking for electronic claims data, very
18 particularized, on a transaction by transaction level with lots
19 of detail, and is specifically tied to documents or
20 electronically stored information concerning payments by
21 institutional payers which are defined as managed care entities
22 or insurance companies for prescriptions for the brand drugs
23 attached in Appendix A sold to individuals with private
24 insurance coverage. So this--

25 THE COURT: And your argument is that the result are

1 just for people who are uninsured?

2 MR. FLUM: Exactly. Judge Saris ordered that
3 discovery going forward is limited to new issues raised by the
4 U&C class and pled in the complaint. So--

5 THE COURT: U&C stands for underinsured class?

6 MR. FLUM: No, it stands for usual and customary.

7 THE COURT: Oh, usual and customary.

8 MR. FLUM: So the way this works, Your Honor, is--

9 THE COURT: But the class is composed or purported
10 class is composed of uninsured individuals?

11 MR. FLUM: Correct. And because they don't have
12 insurance, they don't have the benefit of any special rates
13 that insurance companies will negotiate with retailers and
14 instead--

15 THE COURT: All right.

16 MR. FLUM: --they pay, you know, whatever the cash
17 price is that the pharmacy charges when they walk into the
18 store, and as I said, we started taking this discovery and what
19 we are finding is there are many different ways that the
20 pharmacies set the U&C cash price. Some base it on cost. Some
21 base it on the prices that competitors are charging.
22 Plaintiffs allege some of them are basing it on the AWP, but
23 the pricing benchmark that is at issue in the case, but there's
24 tremendous variation. Now, plaintiffs, you know, when raised
25 before bringing motion, when we raised our objection to Request

1 No. 4, which is specifically targeted to insured claims data,
2 not the prices that are being paid by the uninsured members of
3 the class, plaintiffs came back and argued, well, that
4 discovery is proper under the scheduling order because the U&C
5 prices are tied or connected or related in some unspecified way
6 to insured reimbursements. That's the position that plaintiffs
7 kept taking and they offered a convoluted theory that really is
8 not articulated very fully in their briefs or the theory seems
9 to be that these U&C prices are somehow related to the payments
10 that are being made under the insurance contracts and
11 plaintiffs have jumped around about exactly what that
12 relationship may be. But whatever it's, it's a different
13 theory than the one that they pled in their complaint in
14 paragraph 81 where they said that the U&C prices are tied to
15 reported AWP's. That's the theory that the judge allowed them
16 to go forward on. Now, they're proposing to take some very
17 intrusive discovery related to a whole new theory of cash
18 prices, U&C prices being tied to some other measure, apparently
19 what the insurance companies are paying. And, again, on its
20 face, this insured discovery is not directed to the U&C cash
21 prices so it's not within the four corners of the discovery
22 that Judge Saris ordered the plaintiffs could pursue in her
23 January 2nd scheduling order. It is extremely intrusive and
24 burdensome on the third parties that are being subpoenaed.

25 THE COURT: Have they complained?

1 MR. FLUM: Pardon me?

2 THE COURT: Have these been served on the third
3 parties?

4 MS. CONNOLLY: Yes.

5 MR. FLUM: Yes.

6 THE COURT: And have they complained about anything?

7 MR. FLUM: They, my understanding is they've objected
8 and I think they're waiting on the outcome of this motion to
9 see whether this discovery--

10 THE COURT: Do they specifically object to No. 4?

11 MR. FLUM: The objections I've seen were all asserted
12 in response to No. 4 and some of the other categories as well.

13 THE COURT: Okay.

14 MR. FLUM: And the fact of the matter is I mean this
15 discovery is extremely burdensome and intrusive. The subpoena
16 is asking for 10 years of claims data and it's very detailed
17 information on those claims. You know, literally we're talking
18 about hundreds of millions of transactions if the third parties
19 were to comply with the subpoenas, and we think that Your Honor
20 should grant our motion and order the plaintiffs to withdraw
21 this request because, again, it violates--

22 THE COURT: I'm not going to order anyone to withdraw
23 a request. If I grant your motion I'll order it stricken and
24 that there be no need for a compliance.

25 MR. FLUM: All right. Then we would welcome that

1 relief because if this discovery is permitted to proceed, what
2 we're going to end up with then is another round of motion
3 practice by all of these third parties who will be asserting
4 their own objections based on burden and privacy and many other
5 issues. So, I mean, as it stands, Your Honor, this discovery
6 is not tied to the issue--

7 THE COURT: Okay. I think you've made your point and
8 I understand what you're saying and I think you're starting to
9 repeat yourself.

10 MR. FLUM: All right.

11 THE COURT: Let me let the plaintiffs speak and then
12 you can say anything you want in rebuttal.

13 MR. FLUM: Thank you, Your Honor.

14 THE COURT: Ms. Connolly.

15 MS. CONNOLLY: Thank you, Your Honor.

16 There's not a lot of disagreement about the language
17 of our third amended complaint, what it says about U&C prices
18 or what Judge Saris' orders says. Where there is
19 disagreement--

20 THE COURT: Is this a written order or an electronic
21 order?

22 MS. CONNOLLY: It's a written order.

23 THE COURT: It is.

24 MR. FLUM: It's provided to Your Honor as Exhibit 3
25 to the Flum declaration.

1 THE COURT: Okay.

2 MS. CONNOLLY: So that the discrete issue--

3 THE COURT: On the issue, the date it was issued,
4 please?

5 MR. FLUM: The date it was issued was--

6 THE COURT: January 8th.

7 MS. CONNOLLY: January 2nd.

8 MR. FLUM: January 2nd.

9 THE COURT: Would you pull up, print that out,
10 please, January 2nd, Judge Saris' scheduling order, please.

11 Okay. Go ahead.

12 MS. CONNOLLY: So because there isn't much dispute
13 about the language of our third amended complaint and there's
14 no dispute that the scheduling order says that we're not
15 entitled to new discovery, the discrete issue that you're faced
16 with today is whether this is indeed new discovery, and we
17 contend that it is and that it relates to our U&C claims for
18 this reason. Third party reimbursement or institutional pay or
19 data which we're seeking in that fourth request is always tied
20 to AWP. That very issue was the subject of the entire AWP
21 litigation that was before Judge Saris. There's never--

22 THE COURT: Yeah, but their amended complaint says
23 that the U&C is tied to AWP.

24 MS. CONNOLLY: Right, but it's tied to AWP because
25 third-party reimbursement data is, reimbursement are benchmark

1 to AWP. So for example, a third-party payer is going to be
2 paying AWP minus 15%.

3 THE COURT: All right.

4 MS. CONNOLLY: So what we're seeking to do through
5 this discovery is to analyze the relationship between U&C
6 prices and third-party reimbursement data.

7 THE COURT: Why should you just be analyzing it
8 between U&C and AWP?

9 MS. CONNOLLY: Because it's our theory that the
10 relationship between U&C and AWP is reflected in the
11 relationship between U&C and this third-party reimbursement
12 data, which by definition is based on AWP. So you can see the
13 relationship between U&C and AWP by looking at the
14 relationship--

15 THE COURT: Why can't you just look at the two of
16 them? Why do you have to look at anything beyond AWP and U&C?

17 MS. CONNOLLY: Because you want to look at the,
18 that's what we have explained in our papers. You want to look
19 at the actual reimbursements made because there are times there
20 are other--

21 THE COURT: Well, wait a minute, wait a minute, hold
22 on just a second. Why do you, we're talking about uninsured as
23 class.

24 MS. CONNOLLY: Right.

25 THE COURT: This is what they paid?

1 MS. CONNOLLY: Right.

2 THE COURT: Okay. Now, and you're saying that they
3 pay usual and customary price which you say is tied to AWP.

4 MS. CONNOLLY: It's tied to AWP and also tied to
5 third-party reimbursement for this reason, Your Honor. When--

6 THE COURT: Well, that theory is not expressed in
7 the, in your third amended complaint. You've got it only tied
8 to AWP.

9 MS. CONNOLLY: Yes, and it is tied to AWP by virtue
10 of being tied to--

11 THE COURT: I know but what I'm getting at is it
12 appears that by neglecting to put that other theory in there
13 that it's tied to this other thing. You know, Judge Saris
14 allowed the amended complaint based on the theory that you put
15 forward and allow discovery based on the theory that you put
16 forward. Now, if you were adding to that theory that Judge
17 Saris was unaware of, it seems to me that you've got problems.

18 MS. CONNOLLY: I don't think it's a new theory, Your
19 Honor, because by virtue of U&C being tied to AWP, it's by
20 definition going to be tied to reimbursements that are based on
21 AWP.

22 THE COURT: What do you mean by definition it's going
23 to be tied to reimbursements?

24 MS. CONNOLLY: Because if the reimbursement is AWP
25 based--

1 THE COURT: Yeah.

2 MS. CONNOLLY: --and we have said that U&C is tied to
3 AWP--

4 THE COURT: Yeah.

5 MS. CONNOLLY: --then U&C is going to be tied to
6 the--

7 THE COURT: Don't you always know what AWP is?

8 MS. CONNOLLY: Well, what do you mean do we always
9 know what it is?

10 THE COURT: I mean, maybe that it's just that I don't
11 fully understand, but it seems to me that, I thought AWP, the
12 average wholesale price of given drugs at given times is known,
13 in other words, or that you've already discussed that.

14 MS. CONNOLLY: Right.

15 THE COURT: You know what the AWP is.

16 MS. CONNOLLY: Right.

17 THE COURT: And then you know what the usual and
18 customary is.

19 MS. CONNOLLY: That's right, but let me tell you
20 where the third-party reimbursement is important, Your Honor.

21 THE COURT: Yeah, I'm not getting it--

22 MS. CONNOLLY: Okay.

23 THE COURT: --frankly.

24 MS. CONNOLLY: Here's the reason, when pharmacies set
25 U&C prices, people who are paying U&C prices, obviously the

1 vast majority of Americans have insurance, so they're not
2 paying a cash price, so when pharmacies set U&C, they are
3 always looking to the third-party reimbursement amount in order
4 to set their U&C prices because they obviously don't want to
5 set it at a price that's lower than their third-party
6 reimbursement amount or else they're going to lose money. So
7 they're looking at that amount and that--

8 THE COURT: So what you're looking for is documents
9 that go into what documents that reflect or documents that are
10 relative to how the U&C price is set or what the U&C price is
11 set at?

12 MS. CONNOLLY: That's primarily going to be the
13 dispute in the second phase of the case. You know, we're
14 almost ready for trial in the main part of the case. In the
15 second part of the case the only dispute between the parties,
16 setting aside all the disputes that are in the main case is how
17 U&C is related to third-party reimbursement and how U&C is set.
18 Judge Saris said today in a status conference--

19 THE COURT: Well, why wouldn't that be, why wouldn't
20 that all have been discovered without this problem with respect
21 or this addition with respect to uninsureds? Why wouldn't this
22 have all be discovered earlier?

23 MS. CONNOLLY: Because we didn't need to prove the
24 relationship between U&C and third-party reimbursement or AWP
25 in the first part of the case because there was no allegation

1 with regard to U&C payers. So now that there is this
2 allegation, what McKesson is really seeking to do is to
3 prohibit us from proving our theory of the U&C part of the case
4 and our theory is that a pharmacy is determining it's U&C price
5 by reference to the third-party reimbursement which is--

6 THE COURT: The U&C price had no relevance to any
7 other claims in the case?

8 MS. CONNOLLY: That's right, Your Honor. It's a
9 completely new class and that's why she put us on a separate
10 discovery track because the U&C plaintiffs were entirely
11 separate, different group of plaintiffs than the third-party
12 payers and percentage pay consumers that were part of the main
13 case.

14 THE COURT: Okay.

15 MS. CONNOLLY: Let me just add something else. You
16 ask about the third parties. The third parties obviously
17 haven't come before you with motions to quash but there's
18 another reason--

19 THE COURT: I don't think they would. Wouldn't they
20 have to bring them in the district in which they're located?

21 MS. CONNOLLY: Right, but they likewise haven't filed
22 them there, Your Honor. I'll represent that to you. But
23 there's another reason why they haven't done that and the
24 reason for that is those third parties have all told us, Your
25 Honor, I don't know - they're saying, Ms. Connolly, I don't

1 know why you're bothering me about this data because
2 McKesson's subsidiary, Relay Health, which we discuss in our
3 papers, has all of this data. By virtue of being a switching
4 service, that subsidiary maintains the AWP data, the U&C data,
5 the third-party reimbursement data. So we've told them, well,
6 we don't want to harass you with all of these requests if we
7 can go get them from McKesson so that we're in the process of
8 negotiating with McKesson regarding the data that we're looking
9 for and that's why they haven't come in and talked about burden
10 because from McKesson--

11 THE COURT: Why didn't you ask them from McKesson to
12 begin with?

13 MS. CONNOLLY: Because we found out about Relay
14 Health in our own investigation.

15 THE COURT: Oh, later on?

16 MS. CONNOLLY: It wasn't anything that McKesson
17 disclosed to us during the process of discovery. So once we
18 learned of it and once third parties starting telling us you
19 really should go talk to McKesson to get this data, that's when
20 we started raising these issues with them. So when we're
21 talking about burden from McKesson, we're literally talking
22 about adding another few fields to a database that we're
23 already seeking through discovery anyway. This isn't even
24 going to be an issue with our going after third parties for
25 electronic data because we don't need to, because McKesson's

1 own subsidiary has it.

2 THE COURT: Okay.

3 MS. CONNOLLY: So for that reason, Your Honor, we
4 would request that you deny the motion.

5 THE COURT: You can reply.

6 MR. FLUM: Briefly, Your Honor. You know, Ms.
7 Connolly is admitting that this is a new theory that's not pled
8 and we--

9 THE COURT: Well, no, no, she's not. She's saying
10 that in order, in the case there hasn't been any discovery as
11 to how the usual and customary was set because it wasn't, how
12 it was related to AWP because that wasn't an issue in any of
13 the other classes and that they need to show how it's set and
14 how the, this information they're seeking in discovery with
15 respect to the reimbursement factors in to how the U&C is set.
16 So it's not really a new theory. It's a subset, it seems to be
17 a corollary of what needs to be proved in order to prove the
18 allegation.

19 MR. FLUM: Well, I think that, the corollary point is
20 the key one because the first three requests in their subpoena
21 for these retailers, we're not objecting to, it's not the
22 subject of this motion, are asking directly how do you set your
23 U&C prices? Are your U&C prices related to AWP? That's
24 request No. 1 and 2, and request No. 3 is asking the retailer
25 to turn over all of their claims data on cash prices and the

1 plaintiffs can sit down with that claims data and with the
2 AWP's that they already have, as Your Honor was correctly
3 surmising, and they can make that comparison themselves. Their
4 expert can make that comparison, but what Request 4 is saying,
5 is trying to bootstrap a new theory that is alleging that the
6 U&C prices are now really set in relation to the insured
7 reimbursement. Not only is it new it contradicts what they
8 alleged in their complaint. I mean, their complaint says that
9 the U&C prices are tied report to AWP's and are usually set at a
10 price above AWP, above AWP, Your Honor, not tied to some
11 discounted price below AWP that insurance companies pay. So
12 this really is a new theory and of course there's going to be a
13 relationship between the insured re-imbursement and AWP. It's
14 an indirect relationship. I mean, they can make the direct
15 comparison between U&C and AWP with the information they've
16 already got on AWP and the additional discovery that they're
17 seeking in Requests No. 1 through 3. And, you know, in terms
18 of Ms. Connolly's point regarding Relay Health data, we have
19 told the plaintiffs the same thing I'm saying here today. To
20 the extent you are asking us to produce Relay Health data
21 showing U&C prices, we'll do that, and we have been negotiating
22 with plaintiffs about the exact parameters of what we're going
23 to produce. But we've also said, because plaintiffs are asking
24 us to turn over the entire Relay Health database, which
25 involves massive amounts of information, terabytes, 30-40

1 terabytes of data that fill large warehouses full of
2 computers, we told plaintiffs, we're not going to produce data
3 on insured transactions because of what Judge Saris ordered.
4 You're just trying to go back through the back door and redo
5 discovery.

6 THE COURT: Well, how is this, how are they doing
7 that because what plaintiffs' counsel is representing to me is
8 that they didn't have to do this discovery with respect to the
9 allegations as to the other classes that are involved in this
10 litigation? So to what, how are you saying that what they're
11 doing is trying to get more discovery on claims other than the
12 new ones that are contained in the amended complaint?

13 MR. FLUM: Your Honor, they chose back when they had
14 unrestricted discovery on the insured claims that are the
15 subject of Classes 1 and 2, they chose not to go to the
16 retailers and subpoena this data--

17 THE COURT: They're saying that it wasn't pertinent
18 to those claims where it is pertinent to these claims. And
19 what I'm asking you is how is it pertinent to the old claims?
20 In other words, how are they getting discovery that is useable
21 in the claims that existed before the complaint was amended?

22 MR. FLUM: Because the subject of the old claims is
23 the amount that was being paid on those insured transactions.
24 That's exactly what those old claims are about. The way they
25 chose to do it when they were developing a record for those old

1 claims is to go to a service called IMS which surveys all of
2 the retailers, not just a small group that they've subpoenaed
3 here that does a national survey and IMS reports on the retail
4 prices that are being charged by all of these retailers and
5 paid by the insurance companies for these claims, that's the
6 data they presented to Judge Saris in support of their class
7 certification motions, the data their expert chose to stand on,
8 and in fact the expert called it the gold standard for data on
9 retail reimbursements. And, you know, plaintiffs made that
10 choice to proceed that way for whatever reason, perhaps because
11 they think that there are problems with what their expert did
12 the first time around, they're now coming back and saying, no,
13 we want to go and redo the discovery. We've changed our mind.
14 We now aren't satisfied with the IMS data. We want to get
15 detailed transactional data on insured claims, which are not
16 the subject of the U&C class.

17 THE COURT: All right. Do you want to respond to
18 that because I'm not quite sure - I mean, I hear what he's
19 saying. I'm not sure I fully understand the ramifications of
20 it--

21 MS. CONNOLLY: Yes.

22 THE COURT: --but respond.

23 MS. CONNOLLY: We're certainly not seeking to use
24 this data to go back and redo the work that our expert has
25 done, which--

1 THE COURT: Why isn't the work that your expert has
2 done enough to give you the information you need with respect
3 to this, the amended claims?

4 MS. CONNOLLY: Because that data doesn't have the U&C
5 data, and more specifically, the transactional data doesn't
6 have the relationship on a transaction-by-transaction basis of
7 a U&C claim to a third party reimbursement claim because keep
8 in mind we're looking on a transaction basis between the
9 relationship between the class price and a third-party
10 reimbursement price, and that's what we're looking for in this
11 set and that's why we need it for the U&C part of the case.

12 It's completely different than the reason that we were using
13 IMS data in the main part of the case, which was to show--

14 THE COURT: Are you using any of this data in the
15 main part of the case?

16 MS. CONNOLLY: The main part of the case is over.
17 This--

18 THE COURT: Well, it's not over in the sense that--

19 MS. CONNOLLY: Well, discovery is closed.

20 THE COURT: I know, and so my question is would you
21 be using any of the data that you got in response to Section 4
22 of these subpoenas in support of your claims that have not yet
23 been tried but as to which discovery is closed?

24 MS. CONNOLLY: there's no way we could, Your Honor.
25 The expert reports have already been submitted by our experts

1 and Judge Saris has basically said she believes she's
2 conducted what she believes to be in effect a Daubert hearing
3 in connection with class certification and she's ready to go to
4 trial in that part of the case.

5 MR. FLUM: Actually, Your Honor, their expert has not
6 finished submitting his reports. There's a new report coming
7 from the damages expert.

8 THE COURT: Well, regardless. I mean, that's not
9 neither here nor there.

10 MR. FLUM: But it is here or there because their
11 expert will be using this data. It's the same expert.

12 THE COURT: No one is going to - if I deny this
13 motion, none of this discovery that you're going to get I'll
14 order is to be used with respect to any claims other than the
15 claim that's contained in the amended complaint.

16 MS. CONNOLLY: I understand that.

17 THE COURT: So I take care of that--

18 MR. FLUM: All right.

19 THE COURT: --pretty easily. All right. Let me take
20 the matter under advisement.

21 MR. FLUM: Your Honor, could I respond briefly just
22 as to the new point that Ms. Connolly made? She said that they
23 don't have the U&C data they need to do this comparison. Well
24 that's what they've subpoenaed in Request No. 3. We're not
25 objecting to it. They're going to get that from the retailers.

1 She also said they need to do a transaction-by-transaction
2 comparison. That's not going to show anything about how U&C
3 prices were set. I mean, suppose that the insured price for a
4 30-day supply of Lipitor is \$80 and pharmacy A responds and
5 says, you know, on the date that we dispense that \$80
6 prescription, we charged a cash price of \$100, and pharmacy B
7 says, on that same day we charged a cash price of \$85 for a 30-
8 day supply of Lipitor and pharmacy C says, we charge \$75.
9 That's not going to show you how any of those pharmacies set
10 the U&C price. It's just going to show that they were
11 different. The way that the plaintiffs are going to show how
12 the U&C price was set and whether it relates to AWP is by using
13 the information that they've subpoenaed in the first three
14 requests and having their expert do the analysis. So I again
15 submit, Your Honor, this new discovery is irrelevant and
16 outside the scope of what the judge ordered.

17 THE COURT: All right. As I say, I'm going to have
18 to study this because it's pretty complex. Do you want to
19 respond as to why what you're getting in 1-3 isn't going to
20 give you what you need?

21 MS. CONNOLLY: Yes, Your Honor, because it doesn't
22 have the third-party reimbursement data in it. So the whole
23 purpose of seeking it from a third party or as I've suggested
24 earlier from Relay Health is to be able to see it on a
25 transaction-by-transaction basis, because again, we're looking

1 for the relationship. McKesson keeps saying that we aren't
2 going to be able to prove how they set U&C prices, but we
3 submit that we believe that can be established mathematically,
4 and I don't mean that algebraically, but through our expert's
5 analysis of the data, and that's how we want to do it.

6 THE COURT: I'll take it under advisement. Thank
7 you, very much.

8 MR. FLUM: Thank you, Your Honor.

9 MS. CONNOLLY: Thank you, Your Honor.

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CERTIFICATION

I, Maryann V. Young, court approved transcriber, certify that the foregoing is a correct transcript from the official digital sound recording of the proceedings in the above-entitled matter.

/s/ Maryann V. Young

May 19, 2008

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Certified Court Transcriber
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